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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 544

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN AND THE STATE OF WISCONSIN,
Appellants,

vs.

THE STATE OF ILLINOIS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

Appellants submit the following statement of the basis on which it is contended the Supreme Court of the United States has jurisdiction to reverse, on appeal, the judgment of the Supreme Court of the State of Illinois.

A

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under Sections 1257(2) and 1251(a)(1) of the U. S. Code (Title 28 U. S. C.).

The judgment of the Supreme Court of the State of Illinois, the highest Court of that state, is a final judgment in this suit under Article VI, Sections 1 and 2 of the Constitution of the State of Illinois and Section 18 of Chapter 37 of the Revised Statutes of the State of Illinois and as construed and applied in the following cases: *People* v. *Young*, 309 Ill. 27 (1923); *People* v. *Drainage Commissioners*, 283 Ill. 514 (1918); and *Board of Directors of Chicago Theological Seminary* v. *People*, 189 Ill. 439 (1901) (Aff'd 188 U. S. 662).

B

The Statute of the State, the Validity of the Application of Which Is Involved

The title and pertinent portions of the statute in question as found in *Ill. Rev. Stats.*, 1943, Ch. 120, Sec. 375 read as follows:

> "An Act to tax gifts, legacies, inheritances, transfers, appointments and interest in certain cases and to provide for the collection of the same and repealing certain acts therein named. (Approved June 14, 1909, L. 1909, p. 311).
>
> 375. Property subject—Exceptions—Rates Sec. 1. A tax shall be and is hereby imposed upon the transfer of any property, real, personal, or mixed, or of any interest therein or income therefrom, in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, * * *".

C

The Date of the Judgment and the Application for Appeal

The decree and judgment sought to be reversed was entered in the Supreme Court of Illinois on the 22nd day of September, 1949.

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The petition for appeal, assignment of errors and prayer for reversal was presented to the Chief Justice of the Supreme Court of the State of Illinois on the 16th day of December, 1949, and the order allowing said appeal was executed and the appeal cost bond approved on the 16th day of December, 1949.

D

Nature of the Case and Rulings Below

This appeal is brought to reverse an assessment of inheritance taxes, under the Illinois Inheritance Tax Act, upon a gift which was found by the Trial Court to be a gift to the State of Wisconsin.

Appellants contend that the action of the State of Illinois in taxing a gift to the State of Wisconsin violates the Constitution of the United States and the fundamental sovereignty of the State of Wisconsin.

Kemper K. Knapp, a resident of the State of Illinois, died testate on February 23, 1944. In his will he made a gift of the residue of his estate to "The Board of Regents of the University of Wisconsin". The residue was valued at the date of his death at $2,471,758.49. To the inheritance tax return, which the executors of the estate filed, a protest by Plaintiffs herein was appended protesting any assessment of inheritance taxes on said residue. The subject of this protest was argued at length before the County Judge of Cook County, Illinois, after which he made an assessment of inheritance taxes of $714,097.55. From that assessment order an appeal was taken to the County Court of Cook County, Illinois, where it was affirmed by an order assessing the tax on the passing of the gift to "The Board of Regents of the University of Wisconsin."

The hearing before the County Court was on oral argument and a stipulation of the parties—one of the matters

of law and of fact stipulated being that "The Board of Regents of the University of Wisconsin is the State of Wisconsin". At said hearing the Plaintiffs urged that to apply the Illinois Inheritance Tax Act to the State of Wisconsin would be an unconstitutional application of said Act. The part of that Act which is here relevant (Ill. Rev. Stats. 1943, Ch. 120, Sec. 375-403) is quoted in Section "B" of this "Statement as to Jurisdiction".

In entering its order affirming the assessment of inheritance taxes, the County Court of Cook County, Illinois, included therein the following findings, among others:

> "(1) The Board of Regents of the University of Wisconsin is the State of Wisconsin for all purposes relevant to this case.
>
> (2) The Board of Regents of the University of Wisconsin is an instrumentality and arm of the State of Wisconsin.
>
> (3) The gift here assessed was in substance a gift to the State of Wisconsin."

Subsequent to the aforesaid order affirming the assessment of tax, Plaintiffs appealed to the Supreme Court of Illinois where briefs were submitted by the parties and the cause was orally argued. The Supreme Court of the State of Illinois, the Court of last resort in the State, on September 22, 1949, affirmed the order of assessment without giving effect in its opinion to the express finding of the Trial Court that "The Board of Regents of the University of Wisconsin is the State of Wisconsin for all purposes relevant to this case". The Supreme Court of the State of Illinois did not give effect to the two chief considerations presented by the Appellants, to-wit: (1) a state cannot tax a sister state; and (2) if the Illinois statute is construed to uphold a tax on a sister state, it is uncon-

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stitutional under the Constitution of the United States. The failure of the Supreme Court of Illinois to heed said express finding of the Trial Court, and its failure to give effect in its opinion to the two chief matters presented, as aforesaid, was called to its attention in a Petition for Rehearing filed by the Appellants. A rehearing was denied without opinion on November 21, 1949.

The law in Illinois, as many times enunciated by the Supreme Court of the State of Illinois, is and always has been that the Illinois inheritance tax is a tax on the right of a recipient to receive property from a decedent, as distinguished from a statute which imposes a tax on the right of a decedent to transmit his property. Illinois' Supreme Court decisions have been consistent in this matter and are illustrated among others by the following cases:

People v. *Strom*, 363 Ill. 241 (1936);
In re Estate of Johnson, 389 Ill. 425, 428 (1945);
People v. *Moses*, 363 Ill. 423 (1936);
People v. *Varel*, 351 Ill. 96 (1932);
People v. *Tombaugh*, 303 Ill. 591 (1922).

The tax in the instant case was levied upon the State of Wisconsin, because "The Board of Regents of the University of Wisconsin" is the State of Wisconsin. That said The Board of Regents is the State of Wisconsin as a matter of fact and as a matter of law was the considered opinion of the parties to this action and was so stipulated. Moreover, such was specifically found by the County Court in its findings that "The Board of Regents of the University of Wisconsin is the State of Wisconsin *for all purposes relevant to this case.*" The County Court, overlooking the fact that the recipient, under the will of the decedent, is "The Board of Regents of the University of Wisconsin" and is, by way of stipulation, the State of Wisconsin, made

the following irrelevant findings respecting the *University* of Wisconsin:

> (4) The General Assembly of the State of Illinois, by the Inheritance Tax Act as it stood at the time of the death of Kemper K. Knapp, clearly evinced its intention to tax gifts to State universities, of states other than Illinois, including the University of Wisconsin.
>
> (5) The University of Wisconsin is within the purview of the taxing provisions of the Illinois Inheritance Tax Act imposing a tax upon "persons, institutions or corporations."
>
> (6) The Act does not expressly or by implication exempt the University of Wisconsin from the tax.
>
> (7) The tax as thus imposed upon the University of Wisconsin does not violate any provision of the Constitution of the State of Illinois, any provision of the Constitution of the United States or any immunity of the State of Wisconsin.

Since the parties stipulated that the gift here assessed was made to the State of Wisconsin, and the County Court expressly so found, there is no relevance or materiality in findings respecting *the University.* "The Board of Regents of the University of Wisconsin" is an arm of the State. As found and stipulated, it is *the State.*

The Supreme Court of the State of Illinois likewise based its decision on matters irrelevant when it opined that the statute *as here applied* was valid because the gift was made to The Board of Regents and because it considered that the Board is within the words of the statute "corporation" and "institution". This can be so only in the same broad, loose sense that a State is an institution or corporation. If the Illinois Courts' view is correct, can any

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untaxable gift be made to a State, if the subsequent disposition of it by the State is to be pursued? The State of Wisconsin is not a corporation as the word is used in the Illinois Act. The language of an immediately prior Illinois Inheritance Tax Act (Laws of 1895, page 301) "to any person, or persons, or to any body politic or corporate" was changed by the legislature in the present Act (Ill. Rev. Stats., 1943, Ch. 120, Sec. 375) to read "to persons, institutions, or corporations", and in the present Act whenever a state is intended, the unambiguous word "state" is used. The Wisconsin statute designating The Board of Regents as a "body corporate", but not giving corporate powers to the Board, is irrelevant and was properly so considered by the parties to this cause, neither of whom mentioned it in the briefs or on oral argument, yet the Illinois Court considered it controlling.

The Supreme Court of the State of Illinois also upheld the validity of the Illinois Inheritance Tax Act by erroneously applying the doctrine of the case of *U. S.* v. *Perkins*, 163 U. S. 625 (1895). As pointed out by the Appellants on numerous occasions, in briefs and oral arguments in the instant cause, that case was not in point because it arose under a New York inheritance tax act which had been repeatedly construed as imposing a tax on the *right to transmit property at death*—it was not a tax on the right to receive as is the situation in Illinois. This fundamental difference in the two taxing statutes clearly appears from the opinion in the *Perkins* case and is well set forth by Judge Augustus Hand in the case of *Prentiss* v. *Eisner*, 260 Fed. 589 (D. C., S. D. N. Y., 1919). In referring to the *Perkins* case, he said at p. 591:

> "The Supreme Court held that the New York transfer tax was upon the testator's right to dispose of his property, and thus sustained the tax *for, if it had been*

treated as upon any right of succession of the United States, the tax could not have been lawfully imposed." (Italics supplied.)

In spite of its repeated assertions that the Illinois Inheritance Tax is one upon the right to receive, the Illinois Supreme Court ignores the difference between such a tax and the succession tax—a tax upon the right to transmit—involved in the *Perkins* case. The Supreme Court of Illinois in this case has mis-applied the doctrine of the *Perkins* case by saying that the Illinois tax "is extracted from the legacy before it passes" and "the legacy passes only after diminution in the amount of the tax". The Illinois Act expressly provides that the tax shall arise upon a "transfer" and the tax is measured by the amount "of each individual transfer". While in Illinois the obligation of the donee to pay the tax arises with the "transfer", the tax is predicated upon the entire transfer; and it is the entire gift prior to "any diminution in the amount of the tax", upon which the tax, if any, must be computed.

The foregoing demonstrates that the Supreme Court of Illinois has unconstitutionally affirmed an assessment of inheritance taxes made on the passing of property to the State of Wisconsin and in so doing it overlooked its own consistent holdings that the Illinois inheritance tax is a tax on the right of a recipient to receive property.

E

Cases Believed to Sustain Jurisdiction

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Kansas v. *Colorado*, 185 U. S. 125 (1902);
State of Missouri v. *State of Illinois*, 200 U. S. 496 (1906);

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State of Rhode Island v. *Commonwealth of Massachusetts*, 12 Peters (37 U. S.) 657 (1838);
Connecticut v. *Massachusetts*, 282 U. S. 660 (1931);
New York v. *New Jersey*, 256 U. S. 296 (1921);
Wisconsin v. *Illinois*, 278 U. S. 367 (1926);
Missouri v. *Illinois*, 180 U. S. 208 (1901);
Georgia v. *Tenn. Copper Co.*, 206 U. S. 230 (1907);
Wyoming v. *Colorado*, 259 U. S. 419 (1922).

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Sections 1257(2) and 1251(a)(1) of the U. S. Code as enacted by the 80th Congress (which became effective September 1, 1948) and that the inquiry, then, is whether Section 1 of the Illinois Inheritance Tax Act, being Chapter 120, Section 375 of the Illinois Revised Statutes, 1943, is constitutional as applied and enforced in respect of the instant case.

Respectfully submitted,

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APPENDIX "A"

Docket No. 31104—Agenda 31—May, 1949

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, et al., Appellants

v.

THE STATE OF ILLINOIS, Appellee

Mr. Chief Justice Thompson delivered the opinion of the Court:

This is an appeal from the county court of Cook County, which affirmed an assessment of inheritance taxes made by the county judge of said county upon the passing by will of the residue of the estate of one Kemper K. Knapp, deceased, who died testate, a resident of Cook County, on February 23, 1944. The executors of the will filed an inheritance tax return on February 17, 1945, to which return was appended a written protest to the assessment of any tax which might be levied in respect to the passing of the residue of said decedent's estate. The residue amounted to $2,471,758.49, and was, by the eighth clause of the will, given to the Board of Regents of the University of Wisconsin.

On a hearing before the county judge an order was entered assessing inheritance taxes of $714,097.55. Objections were filed to the assessment and on a hearing in the county court of Cook County, the facts being stipulated, the court found that the Board of Regents of the University of Wisconsin in the State of Wisconsin for all purposes relevant to this case; that the gift was, in substance, a gift to the State of Wisconsin; that the University of Wisconsin is within the purview of the taxing provisions of the Illinois Inheritance Tax Act imposing a tax upon persons, institutions or corporations (Ill. Rev. Stat. 1943, chap. 120, par. 375 *et seq.*) and entered an order confirming the assessment of the tax. This cause is now before us on direct appeal, the revenue of the State being involved.

It is the contention of appellants (1) that the act does not provide for a tax upon a bequest to a State and there-

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fore does not cover the bequest here involved; (2) that the assessment in question is unconstitutional; and (3) that the Illinois Inheritance Tax Act cannot be applied against a sovereign State of the United States.

Appellants urge the questions before the court are: First: Does the Illinois Inheritance Tax Act by its terms provide for a tax upon a bequest to a sister State? Appellants contend that the State of Wisconsin is not a "person" or an "institution" or a "corporation" within the meaning of the act. Second: Can the Illinois Inheritance Tax Act constitutionally provide for a tax on a sister State? Appellants contend that as a sovereign the State of Wisconsin cannot be taxed by the State of Illinois. This, of course, presents for determination the question of whether or not the bequest here was one to a "person," "institution," or "corporation," within the meaning of the Illinois Inheritance Tax Act, and whether or not Illinois can impose her inheritance tax on a bequest to the Board of Regents of the University of Wisconsin.

Appellants contend the Illinois act has no application to the instant bequest, citing the following language of the act: "A tax shall be and is hereby imposed upon the transfer * * * to persons, institutions or corporations, not hereinafter exempted, * * *." (Ill. Rev. Stat. 1943, chap. 120, par. 375.) Appellants waive and renounce any rights to exemption under the act and rely solely on the proposition that the act has no application whatever. They rely on the well-settled rule that in construing statutes words must be given their common accepted meaning and the courts may not extend the clear meaning expressed in the terms of the statute. They point to the absence of the word "State" in the pertinent section of the statute quoted above and contend that because the legislature did not use the word "State" in other sections of the act, its absence in the taxing section must be taken as excluding Wisconsin from the purview of the act.

We are unable to grasp the importance of this contention in view of the act and the bequest, which, in part, reads as follows: "I direct my executor and my trustee to pay and turn over to the Board of Regents of the University of

Wisconsin all the rest, residue and remainder of my estate." That the legatee named is a corporation is not only undisputed, but is expressly so declared by the statute of Wisconsin, which provides: "The Board of Regents and their successors in office shall constitute a body corporate by the name of the 'Regents of the University of Wisconsin'." That the named legatee is also an instrumentality of Wisconsin forms the only basis of appellants' contention, but this in no way restricts the plain language of the statute of Wisconsin which created the corporate entity nor lessens the import of the plain language of the bequest which directed the payment of the residue to be made to the Board of Regents of the University of Wisconsin.

It is appellee's position that a corporation is not excluded from the application of the act by virtue of its being an instrumentality of a State, and counsel cite the case of *People* v. *Richardson*, 269 Ill. 275. In the *Richardson* case a tax was assessed on an escheat to an Illinois county, and the county resisted on the ground that public corporations were not within the act. We held in that case the term "corporation", as used in the Inheritance Tax Act, was broad enough to include municipal corporations of every character and that the act applied to every corporation not afterwards exempted in said act.

Appellants seek to differentiate this case on the ground that the county was a corporation, but that Wisconsin was not. We find here a close analogy between an escheat to a county which, incidentally, is an arm of the State and the bequest in the instant case to the Board of Regents which is also, incidentally, an arm of the State of Wisconsin.

Further, in view of the amendment of the act in 1939, (Ill. Rev. Stat. 1939, chap. 120, par. 401) which specifically exempted the State of Illinois and its political and corporate instrumentalities from the proper operation of the act, it would seem that appellants' contention as to the absence of the word "State" from section 1 of the act is not founded on a sound basis. This legislation presents a clear inference that the State and its instrumentalities are included in the act unless specifically exempted. We

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find further support in the case of *United States* v. *Perkins*, 163, U. S. 625, 16 Sup. Ct. Rep. 1073, which holds the United States is within the word "corporation" as used in the New York act imposing an inheritance tax upon "persons" or "corporations" not exempt by law from taxation. From what we have above pointed out it is apparent that the act applies to the State of Wisconsin or its instrumentalities.

We are next confronted with the controlling question as to whether the Illinois act is constitutional as applied to the legacy here. It is the contention of appellants that the act is unconstitutional for the reason that Illinois may not impose legislation upon Wisconsin as applied to this legacy, that Wisconsin is a sovereign State and that Illinois cannot, as against her, impose restrictive legislation. That this is correct as an abstract proposition of law is amply supported by the authorities cited. *Kansas* v. *Colorado*, 206 U. S. 46, 27 Sup. Ct. 655.) As applied to the instant contention, however, the only question seems to be whether the Illinois Inheritance Tax Act, as applied to the gift in question, violates those principles.

Appellants first assert that the Illinois act levies a tax upon the right to receive and not on the property itself. That is the well-settled rule in this State. (*In re Estate of Johnson*, 389 Ill. 425; *People* v. *Moses*, 363 Ill. 423; *People* v. *Estate of Strom*, 363 Ill. 241; *People* v. *Varel*, 351 Ill. 96; *People* v. *Tombaugh*, 303 Ill. 591.) Appellants then contend that the right to receive the legacy in question arises from the sovereignty of Wisconsin and the right as given to the Board of Regents of the University of Wisconsin by the statutes of that State is a sovereign right on which Illinois may not impose her legislation. No cases are cited on that point, but we find the decisions are to the contrary. In *Kochersperger* v. *Drake*, 167 Ill. 122, this court said: "The laws of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State." To this same effect are *National Safe Deposit Co.* v. *Stead*, 250 Ill. 584, and *People* v. *Estate of Strom*, 363 Ill. 241. We further find the Federal decisions are in accord. In *Mager* v. *Grima*, 49 U. S. 487, 489, in discussing a State tax on legacies

to aliens, the court said, "Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * and if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." In harmony with this decision are *Plummer* v. *Coler*, 178 U. S. 115, 20 S. Ct. 829, *United States* v. *Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, *United States* v. *Fox*, 94 U. S. 315. These decisions would seem to fix Wisconsin's right to receive the present legacy as a creature of and arising from the statutes of Illinois as against the claim that such right arises from Wisconsin's sovereignty. This court has held that the State has a vested financial right in the estate of every decedent in this State which is subject to the payment of an inheritance tax, and such right is equal in degree to that of the personal representative, the heir or devisee of the decedent, and it vests at the same time that the inerest of the personal representative, heir or devisee vests. (*National Safe Deposit Co.* v. *Stead*, 250 Ill. 584.) Further, in the case of *Northern Trust Co.* v. *Buck & Rayner*, 263 Ill. 222, this court said, "That portion of the estate which under the Inheritance Tax law vests in the State by mere operation of law becomes severed from the remainder of the estate and cannot pass either by descent or devise." In view of these decisions, the charge of the act can reasonably be said to be one against the donee only in that it incidentally operates to reduce his share. This would not seem to impose a direct burden on the donee or the State of Wisconsin. We are of the opinion that such rights as Wisconsin and its Board of Regents take in the legacy in question arise from and are created by the statutes of Illinois.

It is apparent after reading the many cases cited for the appellants and appellee that great reliance is placed by appellee on the *Perkins* case, above cited where the State

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of New York assessed an inheritance tax on a legacy to the United States, and there a question analogous to the instant one arose in the language of the court, "whether it is within the power of the State to tax bequests to the United States." The court held that the tax there was not against the propery itself, but upon the power of the testator to bequeath his property and therefore was lawful in the case of a legacy to the United States. The holding was grounded on the theory that the legacy became the property of the United States only after diminution in the amount of the tax "and it is only upon that condition that the legislature assents to a bequest of it." For that reason it was held not objectionable as a tax upon the property of the United States. In the present case, as disclosed by the Illinois cases (*National Safe Deposit Co.* v. *Stead*, 350 Ill. 584, and *Northern Trust Co.* v. *Buck & Rayner*, 263 Ill. 222), the legacy passes only after diminution in the amount of the tax. The tax here under the rationale of these cases is not on the property of Wisconsin and is within the doctrine of the *Perkins* case.

Appellee cites the case of *Plummer* v. *Coler*, 178 U. S. 115, 20 S. Ct. 829, where an inheritance tax was assessed against a legacy containing United States government bonds, which were, by Federal statute, exempt from taxation. The court upheld the assessment, and, in discussing the *Perkins* case, said, "One of the propositions recognized in that case applicable to the present one is that a state tax that would be invalid if imposed directly on a legacy to the United States, may be valid if the amount of the tax is taken out of the legacy before it reaches the hands of the government—the theory of such a view apparently being that the property rights of the government do not attach until after the tax has been paid, or until the condition imposed by the tax law of the state has been complied with." From this language the appellants seek to infer that a tax like that of Illinois on the right to receive would be invalid as applied to a legacy to a sovereign State. Appellants point out that the tax in the *Plummer* case again was on the right to transmit, not on the right to receive. It is apparent the controlling consideration in the *Plummer* case

as in the *Perkins* case, was whether the tax was applied to property in the hands of the government, and that the theory of the application of the tax was of no controlling importance. The *Plummer* case seems to support the assessment in the instant case under the Illinois act as interpreted by this court.

We find considerable discussion as to the holding in the case of *Snyder* v. *Bettman*, 190 U. S. 249, 23 S. Ct. 803, where the pertinent question was whether the Federal government had power to impose a succession tax on a legacy to a municipal corporation of a State which, although factually converse, is closely analogous to the question presented here. In the *Snyder* case it was conceded that the Federal government had no power to regulate the devaluation of property and the power to impose the tax was found in the general taxing powers of the Federal government. Upon the question of the power of the United States to tax a bequest to a State or one of its municipal corporations, the court said: "Conceding fully that congress has no power to impose a burden upon a state or its municipal corporations, the question in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property." And the court in this case, saying "Having determined, then, that Congress has the power to tax successions; that the states have the same power, • • • and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or the agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property," then upheld the tax on the ground that it was extracted from the property in the hands of the executor and was not objectionable as a tax upon a municipality, even though it operated incidentally to reduce the bequest.

Appellants seek to differentiate on the ground that the tax there operated on the property of the testator, not the donee, and that the act there required the executor to pay

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the tax before distribution. Such a differentiation cannot be reconciled with the holdings of this court that under the Illinois act the tax vests in the State and is severed at the moment of the testator's death, and in view of the strict requirements of the Illinois act that the executor pay the tax before distribution. Ill. Rev. Stat. 1947, chap. 120, pars. 378, 379.

After a careful analysis of the many cases cited and the provisions of the statute involved herein, the rule seems to be settled that the right to receive an Illinois legacy is a creature of the State of Illinois; that the State's right to the amount of the tax vests at the moment of the death of decedent and is equal to that of legatees; that the tax is extracted from the legacy before it passes and therefore the tax as assessed here is not a direct burden upon the Board of Regents of the University of Wisconsin or upon Wisconsin, even though it incidentally reduces the legacy.

We are of the opinion that the instant case is within the test announced in the *Perkins* case and approved in the *Plummer* and *Snyder* cases, and that the tax was properly assessed. In accordance with our views as hereinabove expressed, the judgment of the county court of Cook County is affirmed.

Judgment affirmed.

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IN THE

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OCTOBER TERM, 1949.

No. 544

THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN AND THE STATE OF WISCONSIN,
Appellants,

vs.

THE STATE OF ILLINOIS,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS.

In view of Appellee's motion for dismissal with which it concludes its statement opposing jurisdiction, the Appellant, pursuant to Rule 7(3) of this Court, presents this brief in opposition thereto.

The State of Illinois urges that the question of the constitutionality of the tax here involved is "not substantial". This is unsound. The question of constitutionality here raised is not formal or abstract. It is a question of real substance. The question was deemed sufficiently "substantial" by the Illinois Supreme Court to devote five pages of its opinion to it, but without meeting it (404 Ill. Adv. Sheets 193, 197-202).

The argument (Appellee's "Statement" p. 2) as to what taxes the State of Illinois *might have* imposed by legis-

lative action are immaterial. The tax in question is to be judged by the provisions of the law, and not by what might have been provided, but was not.

The Illinois Inheritance Tax is upon the "transfer • • • to persons, institutions or corporations" (Ill. Rev. Stats. 1943 Ch. 120, Sec. 375) and makes specific reference to the "beneficiary against whom the tax is assessed" (Ch. 120, Sec. 382 (d) and to "the persons, institutions or corporations liable for said tax" (Ch. 120, Sec. 390). The Appellee urges (p. 3) that the difference between such a tax on the recipient and a tax on the donor or his estate is one "of form and not of substance". But when the issue is whether the burden of the tax is a direct one, or merely an incidental one, the difference between a tax directly on the recipient and a tax on the donor or his estate becomes the controlling substantial consideration.

Appellee suggests (p. 4) that the decision below is an expounding of the Illinois Inheritance Tax Act; that for the purposes of this case the tax in question is an estate tax; and urges that this decision is "authoritative here". This is also erroneous. The opinion of the Illinois court does not repeal and could not erase the express language of the Act making the tax in question a tax on the recipient. It does not overrule the long line of decisions by the Illinois Supreme Court that the tax is on the recipient and raises a personal liability on the recipient. What the Court held in the instant case was that even though the tax is on the recipient, since the State of Illinois collects and siezes the tax prior to distribution, when it can, without in every instance resorting to a civil action against the recipient, that thus the tax is "extracted" from the legacy before the legatee receives it. The confusion and error inherent in this view of the Supreme Court of Illinois cannot properly be asserted as

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justification for an unconstitutional tax assessed directly against another State.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1949

No. 544

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN, AND THE STATE OF WISCONSIN,
Appellants,

vs.

THE STATE OF ILLINOIS,
Appellee

STATEMENT OPPOSING JURISDICTION

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STATEMENT IN OPPOSITION TO THIS COURT'S JURISDICTION

The facts in this case fully appear from appellants' Jurisdictional Statement and from the Illinois Supreme Court's opinion. They require no amplification.

The question presented can be thus tersely stated:

> May Illinois collect, without infringing Wisconsin's sovereign immunity, an inheritance tax levied in terms upon a testamentary gift to the Regents of the University of Wisconsin, a public corporation and arm of the State of Wisconsin, the Illinois Supreme Court having held that the tax is in substance a diminution of the *quantum* of the gift before its transmission under Illinois statutes of testamentary succession to the University?

Illinois submits that this question is not substantial.

I

The Question Sought To Be Presented Is Not Substantial

Illinois' statutes rendered possible and made valid Knapp's testamentary gift to the University of Wisconsin. Illinois might have inhibited, partially or even totally, the right of Wisconsin or her University to take under Knapp's will. She might have accomplished this result, for example, by an act in the nature of a Statute of Mortmain. Therefore Illinois did far more than afford mere procedural and administrative means for protecting and dispensing Knapp's estate in accordance with his testamentary wishes, although simply providing those means would of itself almost certainly constitute a basis for the tax. *Illinois gave the testator's wishes validity by authorizing and making possible the very gift itself.* She may therefore validly require the payment of a tax as a condition precedent to the efficacy of the testator's *post mortem* beneficence.

Illinois' Inheritance Tax Act is *in pari materia* with her statutes governing descent, distribution and testation. Therefore the provisions of the taxing Act must be integrated with the provisions of the statutes last mentioned. And when it is thus integrated with such statutes, it appears that Illinois has enacted a legislative scheme under which testamentary gifts, including those to universities of sister states, are authorized but measure and are diminished *pro tanto* by a tax upon the beneficiary.

In *United States* v. *Perkins*, 163 U. S. 625, this Court held, although that case was decided when the doctrine of "reciprocal sovereign immunity" was then in full vigor, that New York might validly impose death duties measured by the value of property bequeathed or devised to the Federal gov-

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ernment. The Court declared that such a State tax was "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use * * *."

Wisconsin contends that the *Perkins* case is distinguishable from the instant case because the New York tax was an "estate tax," that is, a tax predicated upon the theory that it was the testator's right to transmit which was taxed, whereas Illinois' tax is an "inheritance tax," that is, a tax conceived as levied upon the right of the sovereign beneficiary to take. In other words, Wisconsin says that while Illinois may tax Illinois residents *post mortem* for the privilege of leaving their property to Wisconsin, she may not in terms lay the tax upon Wisconsin instead of upon the Illinois decedent's estate.

In the first place, this is, for all purposes relevant here, a distinction of form and not of substance. No such *tour de force* of terms will defeat so vital and so highly pragmatic a State function as the taxing power. (Cf. *Gregory* v. *Helvering*, 293 U. S. 465; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331.) But even if substantial reality must be given for some purposes to the conceptual distinction between a tax upon the power to devise and a tax upon the right to take under a devise, the distinction would not be important here; for either the testator's power or the devisee's right is properly the subject of a tax when it is Illinois law that made the gift possible.

Moreover, the Illinois Supreme Court's decision, which is of course authoritative here, has expounded Illinois' Inheritance Tax Act as a diminution of the *quantum* of the gift to gifts *before* transmission of that gift to that State under Illinois law of testamentary succession. Thus the Illinois Court's construction of the act in question in the

instant case assimilates it for constitutional purposes to an estate, not an inheritance tax.

While the Attorney General of Illinois sought no such declaration from the Supreme Court of Illinois, taking the position in that Court that it made no difference whether the gift to Wisconsin was viewed as that of the residuary estate minus the tax or was a gift to the whole estate subject to the tax, the Illinois Supreme Court has seen fit *sua sponte* to treat the Illinois Statute as imposing an estate tax, not an inheritance tax, for all purposes relevant in this case.

Therefore we submit this case presents no substantial Federal question, wherefore the present appeal should be dismissed.

Respectfully submitted,

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No. 544. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN ET AL. *v.* ILLINOIS. Appeal from the Supreme

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of the cases in which judgments or orders were this day announced.

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Court of Illinois. *Per Curiam:* The appeal is dismissed. *United States* v. *Perkins*, 163 U. S. 625. *George I. Haight* for appellants. *Ivan A. Elliott*, Attorney General of Illinois, *William C. Wines*, *Raymond S. Sarnow* and *James C. Murray*, Assistant Attorneys General, for appellee. Reported below: 404 Ill. 193, 88 N. E. 2d 489.